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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KAIWEN CAI,) No. C 07-4886 HRL

Plaintiff,)

v.)

MICHAEL B. MUKASEY,* Attorney)
General; MICHAEL CHERTOFF,)
Secretary, Department of Homeland)
Security; EMILIO GONZALEZ, Director,)
United States Citizenship and Immigration)
Services; CHRISTINA POULOS, Director,)
USCIS California Service Center,)

Defendants.)

**DEFENDANTS' MOTION TO VACATE
ENTRY OF DEFAULT**

Date: April 1, 2008
Time: 10:00 a.m.

Defendants hereby submit this motion to vacate the clerk's entry of default pursuant to Federal Rule of Civil Procedure 55(c). The motion is supported by the Declaration of Melanie L. Proctor. The motion is premised on the following facts:

1. Plaintiff Kaiwen Cai commenced this proceeding on September 21, 2007. Electronic

¹Defendants enter their appearance for the sole purpose of this motion, and reserve the right to assert all appropriate defenses in their responsive pleading. Defendants do not waive proper service.

*Pursuant to Fed. R. Civ. P. 25(d)(1), Michael B. Mukasey is substituted for his predecessor, Alberto Gonzales, as the United States Attorney General.

MOTION TO VACATE DEFAULT
07-4886 HRL

1 Docket, entry 1, September 21, 2007.

2 2. The Court issued its summons on October 11, 2007. Id., unnumbered, dated
3 October 11, 2007.

4 3. Plaintiff failed to serve the summons properly. On November 14, 2007, he returned
5 copies of the summons to the Court, indicating that only Emilio T. Gonzalez, Michael Chertoff, and
6 Paul D. Clement had been served, via “certified priority mail.” Electronic Docket, entries 3, 4, 5,
7 dated November 14, 2007.

8 4. The summons for Emilio T. Gonzalez included Christina Poulos, notwithstanding the
9 fact that she is the Director of the California Service Center, located in Laguna Niguel, California,
10 and not in Washington, D.C. Electronic Docket, entry 3, dated November 14, 2007.

11 5. On January 24, 2008, Plaintiff filed a Request for Entry of Default, asking the Court
12 to enter Defendants’ default for failure to answer. Electronic Docket, entry 8, January 24, 2008.

13 6. On January 31, 2008, the Clerk of the Court entered Defendants’ default. Electronic
14 Docket, Entry 9, January 31, 2008.

15 7. Fed. R. Civ. P. 4(i) states that service upon the United States and its agencies is
16 effected by either delivering a copy of the summons and the complaint to the United States Attorney
17 for the district in which the action is brought, or by sending a copy of the summons and of the
18 complaint by registered or certified mail addressed to the civil process clerk at the office of the
19 United States Attorney. A copy of the summons and complaint must also be sent by registered or
20 certified mail to the United States Attorney General, and by the same means to any named agencies
21 and their officers.

22 8. On February 12, 2008, the Court directed Plaintiff to serve the local U.S. Attorney’s
23 office.

24 9. On February 14, 2008, Plaintiff mailed a copy of the summons and complaint to the
25 U.S. Attorney’s office via Priority Mail. See Declaration of Melanie Proctor.

26 The United States believes good cause exists to vacate the entry of default under FRCP 55(c)
27 because to date, Plaintiff has failed to properly serve Defendants. Priority mail is neither certified
28 nor registered. Moreover, entry of default against the United States would not have a substantive

1 effect on the litigation in this case given FRCP 55(e), which provides that a default cannot be taken
2 against the United States unless the “claimant establishes a claim or right to relief by evidence
3 satisfactory to the court.” Thus, Plaintiff will be required to prove the elements of his case whether
4 or not the United States answers, and the United States will be entitled to rebut that case.

5 For the foregoing reasons, Defendants respectfully request the entry of default be vacated.

6 Dated: February 22, 2008

Respectfully submitted,

7 JOSEPH P. RUSSONIELLO
8 United States Attorney

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10 /S/
11 MELANIE L. PROCTOR
12 Assistant United States Attorney
13 Attorneys for Defendants
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